

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

LEONARD RICHARD OLEAR,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

April 21, 2011

No. 297155

Macomb Circuit Court

LC No. 2009-001960-FH

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

A jury convicted Leonard Richard Olear of third-degree criminal sexual conduct (CSC).¹ Olear was sentenced to three years' probation with the first 12 months to be served in jail. The prosecution contests the propriety of Olear's sentence of probation and the reasons cited by the trial court for a downward departure in sentencing. Olear challenges his conviction as being against the great weight of the evidence and asserts governmental misconduct in failing to analyze physical evidence, ineffective assistance of counsel and problems with the scoring of offense variable (OV) 11. We affirm Olear's conviction, but vacate his sentence and remand to the trial court for resentencing.

The prosecution contends that the trial court erred in using a downward departure from the applicable minimum guidelines range and sentencing Olear to three years' probation with the first 12 months served in jail. Issues of statutory interpretation are subject to de novo review.² "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted."³

¹ MCL 750.520d(1)(c) [victim is mentally incapable, mentally incapacitated, or physically helpless].

² *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

³ *People v Giovannini*, 271 Mich App 409, 412-413; 722 NW2d 237 (2006).

The relevant statutory provision states:

In all prosecutions for felonies, misdemeanors, or ordinance violations *other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses*, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.⁴

Based on this statutory language, the trial court lacked the authority to sentence Olear to probation for his third-degree CSC conviction.⁵ The fact that 12 months of this sentence were to be served in jail is unavailing as Olear's jail sentence is merely a part of the terms of his probation and, as we have already determined, probation is not available for this offense.

While not subject to probation for this offense, on remand the trial court may again determine a downward departure in sentencing to be appropriate.⁶ Originally, the trial court indicated as the premise for its downward departure the receipt of multiple letters reflecting family and community support of Olear, his age and lack of a criminal record. The trial court also indicated that this conviction has effectively precluded Olear from maintaining a career in law enforcement, his previous receipt of several awards, the necessity of his registering as a sex offender and his cooperation with police as supporting a downward departure.

Addressing the statutory requirements for a downward departure at sentencing, our Supreme Court has stated:

[A] minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are

⁴ MCL 771.1(1) (emphasis added).

⁵ *Id.*

⁶ MCL 769.34(3).

to be assessed.” For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.⁷

At the outset, we note that Olear’s lack of a previous criminal record should not be considered as this is already a factor addressed in the scoring of the sentencing guidelines. Even if we were to conclude that the remaining factors cited by the trial court to support its downward departure were objective and verifiable, we caution the trial court that we do not find them to be substantial and compelling. Specifically, the fact that this conviction cost Olear his career in law enforcement, required him to register as a sex offender, and impacted where he will be able to live are simply the natural consequences of the conviction and do not “keenly” grab our attention. Similarly, we do not find the number and content of letters submitted from family, friends and others in the community asserting their support for Olear and his receipt of awards during his relatively short career in law enforcement to comprise substantial and compelling reasons for a downward departure, nor do we find this to comprise an “exceptional case.”

Olear asserts that the scoring of OV 11⁸ violated his due process rights because it lengthened his sentence based on an uncharged CSC count that was not proven to the jury. We review the interpretation and application of statutory sentencing guidelines and constitutional questions de novo.⁹ We review OV scoring for an abuse of discretion to determine whether the evidence supports a particular score.¹⁰ “Scoring decisions for which there is any evidence in support will be upheld.”¹¹

It is well established, based on Michigan’s indeterminate sentencing scheme, that a trial court may use judicially ascertained facts to score OVs and determine a defendant’s minimum sentence within the statutory maximum.¹² It was permissible for the trial court to use judicially ascertained facts based on the record¹³ to score OV 11, which did not serve to alter the statutory maximum sentence.¹⁴ The failure to charge Olear with the second penetration is irrelevant.

⁷ *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008) (footnotes omitted), quoting *People v Babcock*, 469 Mich 247, 257-258, 262-264; 666 NW2d 231 (2003).

⁸ MCL 777.41.

⁹ *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006); *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

¹⁰ *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

¹¹ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

¹² *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006); *People v McCuller*, 479 Mich 672, 698; 739 NW2d 563 (2007).

¹³ MCL 750.520d.

¹⁴ *Drohan*, 475 Mich at 164; *McCuller*, 479 Mich at 698.

OV 11 is scored at 25 points if one criminal sexual penetration occurred.¹⁵ The victim's testimony that Olear also touched her clitoris was sufficient to demonstrate there was a second sexual penetration.¹⁶ The trial court did not abuse its discretion in scoring OV 11 at 25 points as record evidence existed to support the score.¹⁷

We review for an abuse of discretion Olear's unpreserved contention that the jury's verdict was against the great weight of the evidence.¹⁸ "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."¹⁹ "Absent exceptional circumstances, issues of witness credibility are for the trier of fact."²⁰

The issues of witness credibility were properly determined by the jury.²¹ Contrary to Olear's assertion, it has long been recognized that the testimony of the victim, standing alone, and without corroboration, can constitute sufficient evidence to establish a defendant's guilt.²² The trial court did not abuse its discretion by denying Olear's motion for a new trial as the evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand.²³

Olear further contends that the government's failure to investigate, disclose, and analyze physical evidence denied him due process. As Olear failed to preserve this challenge by raising a timely and specific objection and did not request a curative instruction²⁴, we review this issue for outcome determinative plain error affecting substantial rights.²⁵

"A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control."²⁶ "[S]uppression by the prosecution of

¹⁵ MCL 777.41(1)(b).

¹⁶ MCL 750.520a(r); *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

¹⁷ *Elliott*, 215 Mich App at 260.

¹⁸ *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

¹⁹ *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

²⁰ *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

²¹ *Id.*

²² MCL 750.520h; *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998).

²³ *Id.* at 647.

²⁴ See *Unger*, 278 Mich App at 234-235 (citation omitted).

²⁵ *Id.*

²⁶ *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993).

evidence [requested by and] favorable to an accused . . . violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”²⁷ But evidence that is not available is not considered as discoverable material that a prosecutor has failed to disclose.²⁸ “Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process.”²⁹ “Nor does due process require that the prosecution seek and find exculpatory evidence,” as the prosecution is not required to “negate every theory consistent with defendant’s innocence, nor exhaust all scientific means at its disposal.”³⁰

Olear does not contend that the government possessed or suppressed the urine and blood samples or DNA from clothing and bedding evidence. Rather, Olear merely argues there was misconduct because the government failed to collect and test such evidence and speculates that the results would have been favorable to him. Due process did not require the collection and testing of the evidence identified by defendant.³¹ Olear’s argument that the government failed to disclose the exculpatory results of the DNA testing of his fingernails is also without merit. Because the evidence was presented at trial for the jury to consider, Olear cannot show plain error affecting his substantial rights.

Olear also contends that he was deprived of the effective assistance of counsel because of trial counsel’s failure to compel the government to produce and analyze critical evidence. Our review is limited to errors apparent on the record as the trial court denied Olear’s motion for a new trial and an evidentiary hearing.³² To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel’s representation fell below an objective standard of reasonableness and was so prejudicial it denied the defendant a fair trial.³³ Because Olear cannot establish that his trial counsel could have obtained and tested the missing evidence, he has failed to establish the factual predicate of his claim and cannot support his assertion of ineffective assistance.³⁴

²⁷ *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

²⁸ *Davis*, 199 Mich App at 514.

²⁹ *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003).

³⁰ *Id.* (citation omitted).

³¹ *Id.*

³² *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

³³ *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

³⁴ *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Olear also contends that the trial court erred in denying his request for an evidentiary hearing. We review the denial of an evidentiary hearing for an abuse of discretion.³⁵ We find the trial court did not abuse its discretion in denying the request for a *Ginther*³⁶ hearing because Olear failed “to set forth any additional facts that would require development of a record to determine if defense counsel was ineffective.”³⁷

Affirmed, but remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

³⁵ *Unger*, 278 Mich App at 216-217.

³⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³⁷ See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).